IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| | ) | 2 CA-JV 2007-0063 |
| | ) | DEPARTMENT B |
| | ) | |
| IN RE EDREI O. | ) | MEMORANDUM DECISION |
| | ) | Not for Publication |
| | ) | Rule 28, Rules of Civil |
| | ) | Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. JV-05-003F

Honorable Kimberly A. Corsaro, Judge Pro Tempore

AFFIRMED

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George E. Silva, Santa Cruz County Attorney
By Jose A. Vazquez
Nogales
Attorneys for State

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By Matthew J. McGuire
Patagonia
Attorneys for Minor

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E C K E R S T R O M, Presiding Judge.

**¶1** After a contested hearing, the juvenile court adjudicated Edrei O. delinquent for unlawfully possessing marijuana and drug paraphernalia, both class six felonies. At disposition, the court granted the state's motion to dismiss the paraphernalia charge with prejudice, left the possession charge undesignated at the state's request, and reinstated Edrei

on juvenile intensive probation services for one year. On appeal, Edrei contends the court erred in not dismissing the delinquency petition as vague and multiplicitous.

**¶2** These charges against Edrei began with a May 2007 visit to his home by his probation officer, Salvador Grijalva. Looking out his bedroom window, Edrei saw Grijalva arrive and met him at the front door. Upon greeting Edrei, Grijalva noticed the smell of burnt marijuana. The two proceeded inside, where Grijalva conducted a pat-down search. Finding marijuana in the pocket of the shirt Edrei was wearing, Grijalva placed Edrei in handcuffs and called the police.

**¶3** After Nogales Police Officer Victor Heatherington arrived, Grijalva conducted a "probation search" of Edrei's bedroom. On a table near the bed, Grijalva found a homemade pipe, fashioned from a "soda pop can," with marijuana residue in it and more, "green leafy" marijuana "scatt[er]ed around the pipe." He found more marijuana in a plastic sandwich bag under the mattress on Edrei's bed, between the mattress and box spring.

**¶4** On May 21, 2007, Officer Heatherington filed a form affidavit and interim delinquency petition charging Edrei with possession of marijuana and possession of drug paraphernalia. On May 29, for reasons not apparent from the record, the state moved to amend the petition. The juvenile court granted the motion, and the state filed an amended, three-count petition on May 30. Counts one and two identically charged Edrei with unlawfully possessing less than two pounds of marijuana; count three alleged unlawful possession of drug paraphernalia, "to-wit: a baggie." On June 7, again for reasons not

apparent from the record, the state moved to dismiss count one of the amended petition. The juvenile court's order dismissing count one without prejudice was signed on June 7 and filed the following day. The contested adjudication hearing on counts two and three began on June 27.

**¶5** In his opening brief, Edrei states: "Prior to the [June 27 adjudication] hearing, the defense moved to dismiss the charges for vagueness pursuant to . . . Rule 24(A)(1), [Ariz. R. P. Juv. Ct.]." But Edrei has not cited the clerk's record or reporter's transcript nor otherwise directed us to any point in the record where the issue was presented to the juvenile court before the hearing began. *See* Ariz. R. P. Juv. Ct. 106(A) (formerly Ariz. R. P. Juv. Ct. 91(A)); Ariz. R. Civ. App. P. 13(a)(4), (a)(6). We have independently found only a cryptic reference in the reporter's transcript of proceedings on June 27, which does not apprise us of the argument Edrei presented to the court below.[1] The court's minute entry for June 27 states only that "Defense Counsel makes an oral motion to dismiss count 1 of the petition with prejudice, motion is granted."[2]

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[1]The June 27 transcript appears to attribute to the court the following statement: "There's still the motion to dismiss without prejudice. The State has the burden, obviously, of trying to avoid dismissal." Immediately following that statement, however, are comments that seem almost certainly to have been the prosecutor's opening statement.

[2]Because the court had previously dismissed count one of the amended petition without prejudice, the significance of this subsequent ruling presumably was to convert the dismissal to one with prejudice.

**¶6** The record does, however, reflect defense counsel's complaint in closing argument that count two of the amended petition was vague. Count two states:

> UNLAWFUL POSSESSION OF MARIJUANA
>
> That the said juvenile, EDREI . . . O[.,] on or about the 20th day of May, 2007, at approximately 19:13 hours, at the location of 2242 N. Escuela View, City of Nogales, County of Santa Cruz, State of Arizona, did unlawfully possess marijuana, an amount at the time of seizure of less than two pounds, a Class 6 Felony, in violation of A.R.S. § 13-3405(A)(1), § 13-3405(B)(1), § 13-3401, § 13-3405, § 13-801, § 13-701, § 8-201, § 8-202, § 8-206 and § 8-241.

**¶7** Assuming for present purposes only that Edrei's objection was timely—that he could properly wait until closing argument to complain that the charges against him were too vaguely worded—we nonetheless reject the argument on its merits. We find the quoted language in count two satisfied the requirement of Rule 24(A)(1) that a delinquency petition set forth "[t]he facts, in concise language with reasonable particularity as to the time, date, place and manner of the alleged acts of the juvenile and the law or standard of conduct allegedly violated by such acts, which bring the juvenile within the jurisdiction of the court." *Cf. State v. Self*, 135 Ariz. 374, 380, 661 P.2d 224, 230 (App. 1983) (in adult criminal context, indictment using language of the statute violated is generally sufficient). Count two of the petition gave Edrei sufficient information about the offense charged that he could prepare a defense, and it was sufficiently specific to prevent his later being prosecuted again on the same charges in violation of the prohibition against double jeopardy. *See id.* We find

no error in the juvenile court's refusal to dismiss the entire petition, or count two alone, for vagueness.

**¶8** Edrei next contends the delinquency petition should have been dismissed as multiplicitous, claiming "[t]he fact that Counts 1 and 2 were verbatim duplicates on its face establishes that the counts were duplicitous and subject to dismissal. For the Court to dismiss one count and save the petition is a reversible error." Edrei fails, first, to distinguish between the terms "multiplicitous" and "duplicitous." "Multiplicity is defined as charging a single offense in multiple counts, whereas duplicity is charging multiple offenses in a single count." *State v. O'Brien*, 123 Ariz. 578, 582, 601 P.2d 341, 345 (App. 1979). Moreover, it is unclear from Edrei's argument whether he is actually contending the petition was multiplicitous or simply repeating his claim that it was vague:

> Counts 1 and 2 of the petition are absolutely identical. Neither count specifies which of the four marijuana samples relates to which specific count. The juvenile cannot possibly know which seizure he is specifically defending against. If both charges relate to the marijuana taken from his pocket, then the juvenile is being charged twice for the same offense.

**¶9** The prosecutor, however, made clear in his closing arguments that, although the marijuana found on Edrei's person and in his bedroom had been identified and admitted in evidence as four separate exhibits, the singular possession charge in count two encompassed, cumulatively, all of the marijuana found on May 20. Contrary to Edrei's argument, the state did not treat the discrete quantities of marijuana comprising the four

exhibits as supporting four separate possession charges. Thus, ultimately, the defect Edrei perceives is illusory; the petition is not multiplicitous.

**¶10** Further, the fact that, for a ten-day period between May 30 and June 8, 2007, Edrei was charged with two identical possession counts did not require the court to dismiss the delinquency petition in its entirety. As the court explained in *Merlina v. Jejna*, 208 Ariz. 1, 90 P.3d 202 (App. 2004), the legal objection to multiplicitous charges is that they raise the possibility of a defendant's being subjected to double punishment for a single offense in violation of the protection against double jeopardy. *Id.* ¶ 12; *State v. Powers*, 200 Ariz. 123, ¶ 5, 23 P.3d 668, 670 (App. 2001). But multiplicitous charges, by themselves, are not illegal. *Merlina*, 208 Ariz. 1, ¶ 13, 90 P.3d at 205. As long as they do not result in multiple punishment, the charges alone do not violate double jeopardy. *Id.* ¶ 14; *see also United States v. Reed*, 639 F.2d 896, 904 n.6 (2d Cir. 1981) (danger of multiple punishment "can be remedied at any time by merging the convictions and permitting only a single sentence"). Thus the court in *Merlina* expressly rejected the defendant's contention that "charging both greater and lesser-included offenses require[d] dismissal." 208 Ariz. 1, ¶ 15, 90 P.3d at 205.

**¶11** Because the arguably redundant count of the amended delinquency petition was dismissed without prejudice almost three weeks before the adjudication hearing began and the court later deemed the dismissal to be with prejudice, the juvenile court did not err in refusing to dismiss the two remaining counts of the petition. As the court wrote in its

eventual minute entry ruling: "The court finds no merit to the argument that dismissal of count 1 prevents adjudication on an identical count 2 on grounds of double jeopardy. Double jeopardy does not attach when the dismissal is prior to presentation of evidence."

**¶12** We find no error and therefore affirm the juvenile court's orders of adjudication and disposition.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge